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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RAILROADS' REPLY

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RAILROADS' REPLY

Petitioners, comprising the principal railroads of the United States, file this reply in response to oppositions to the railroads' petition for certiorari—and their request for summary reversal—filed by NARI, Fort Howard Paper Company, and Institute of Scrap Iron and Steel.

REPLY

1. The lower court in this case has enjoined railroad rate increases never found unlawful either by the Commission or by any court; and these increases effect

thousands of individual rate adjustments which have never been the subject of any final determination by the ICC. The lower court issued its revocation order on the extraordinary ground that "rate increases which *may* be discriminatory or unreasonable may not stand" pending further ICC proceedings. Pet. App. 2b (emphasis added). The lower court's action is in direct defiance of the statutory plan which allows railroads to initiate new rates and maintain them in force (subject always to shipper reparation claims) *until* the Commission has found those rates unlawful.[1]

Respondents assert that the Act permits removal of "unlawful" rates (*e.g.*, NARI Br. 19; Fort Howard Br. 11), and so it does (by the Commission). But the central point of this case is that the rate increases suspended or revoked by the lower court have never been found unlawful by anyone.[2] On the contrary, all of the increases are consistent with the Commission's guidelines; and most were made and given preliminary

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[1] "Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads. . . . At the end of the [maximum] suspension period, the carrier may put the suspended rate into effect unless the Commission has earlier completed its investigation and found the rate unlawful." *United States* v. *SCRAP*, 412 U.S. 669, 672-74 (1973) (footnote omitted).

[2] Fort Howard asserts that "this statement is materially misleading because the ICC did find that many of the rate levels applicable to individual recyclable commodities were unlawfully discriminatory." Fort Howard Br. 13. In fact, the limited number of rate changes ordered by the Commission were made by the railroads *over a year ago* in the summer of 1979. The increases suspended or revoked by the lower court in this case in 1980 are wholly consistent with the ICC guidelines and were never found either unreasonable or discriminatory by the Commission or the lower court. It will be apparent who is attempting to "mislead" this Court.

scrutiny in general rate increase cases and were allowed to become effective without interference precisely because they did conform to the guidelines. What the lower court has done is to exercise a "suspension" power—which it does not possess—to defer rates never found unlawful, pending further Commission proceedings (to reconsider certain aspects of the Commission's guidelines for which the lower court wanted more support or explanation).

In *Arrow, SCRAP I* and the *Aberdeen* case,[3] this Court held that the lower federal courts have no such equitable suspension power because such injunctive powers were withdrawn from the courts by Congress and confided to the Commission with specific statutory limitations.[4] Since Congress has by statute restricted ordinary judicial remedies in railroad cases, it is meaningless for respondents to cite cases involving general equity powers applied to other industries to sustain stays or preliminary injunctions. *E.g.,* NARI Br. 18; Fort Howard Br. 10. If decisions of this Court like *Arrow* and *SCRAP I* are to be relied upon by litigants and respected by lower courts, then the lower

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[3] *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *United States* v. *SCRAP, supra,* 412 U.S. 669; *Aberdeen & R.R.R.* v. *SCRAP,* 414 U.S. 1035 (1973).

[4] The *Arrow* case explains that this transfer of railroad rate suspension power was based on dissatisfaction with court injunctions against railroad rates, the need for uniform administration by a single agency, and the availability of reparation remedies from the Commission where rates become effective and are later found unlawful. *SCRAP I,* applying this *Arrow* rule to reverse the lower court's injunction against recyclable rates, emphasized that the prohibition against judicial injunctions extended to both direct and indirect judicial intervention. In the *Aberdeen* case, this Court summarily reversed a second such injunction by the lower court.

court's order—doing exactly what this Court has said lower courts may not do—must be reviewed and reversed. The *Aberdeen* case, where the lower court's second such injunction against recyclable rates was reversed summarily by this Court (414 U.S. at 1035), denotes the proper remedy here, where the lower court has issued its third such injunction.

The only case cited in respondents' briefs deserving any discussion in this reply is *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), because it did involve railroad rates. There, four members of the Court said briefly in dicta that after the ICC had passed *finally* on an individual rate increase, there might be some circumstances in which a reviewing court might order discontinuance of the rate. However, the rate increases enjoined by the lower court in this case have never been the subject of final determinations by the Commission.[5] Moreover, in striking down the injunction issued in *Wichita,* the plurality dicta laid down unusual and stringent conditions for any such injunction in future cases. The lower court's cursory order in this case cannot even be justified under *ordinary* equitable requirements for a stay or preliminary injunction, since *none* of the four familiar

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[5] Most of the increases enjoined by the lower court in this case were initiated through general rate cases where, as this Court has noted, only a preliminary assessment of individual rates is ever made (*Aberdeen & R.R.R.* v. *SCRAP,* 422 U.S. 289, 311-315 (1975)), and complaint remedies are reserved to permit shippers to seek such final determinations from the Commission. As for the specific increases involved in this case, the railroads are not aware that any of those revoked by the lower court's order were the subject of a final determination of lawfulness. This case is quite different than *Wichita* where a definitive and final ICC determination had been made on the rate change sought to be enjoined.

preconditions to such an injunction was met in this case. See R.R. Pet. 15-19.

2. The second argument of respondents is that Section 204 of the 4R Act, under which *Ex Parte No. 319* was conducted, is a "unique" statute mandating a special investigation of a particular type of commodity. *E.g.*, Fort Howard Br. 3.[6] The implication of this argument is that the "unique" statute conferred on the lower court special powers to do what it could otherwise not do in railroad rate cases, *i.e.*, enjoin railroad rates never found unlawful by the Commission. The argument not only misconstrues Section 204, but parallels an argument already rejected by this Court in *SCRAP I*.

Section 204 of the 4R Act is quite simple: it told the Commission to investigate the lawfulness of recyclable rates (90 Stat. 40) under "existing" statutory standards of reasonableness and nondiscrimination (see S. Rep. No. 94-499, 94th Cong., 1st Sess. 51 (1973)); it imposed on the railroads the burden of proof in the investigation (90 Stat. 40);[7] and it directed the Com-

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[6] In fact, special treatment of individual commodities, by Congress or the Commission, is far from unique. Rail rates on agricultural commodities were the subject of the Hoch-Smith Resolution many years ago (43 Stat. 801), just as coal rates have been given separate treatment in the Staggers Act of 1980. 94 Stat. 1904. The Commission similarly has conducted numerous investigations focused on specific commodities. *E.g.*, *Ex Parte No. 270 (Sub. No. 5)*, 345 I.C.C. 548 (1976) (iron ore).

[7] The railroads already bore the burden of proof under then existing law when new rates were investigated in a suspension and investigation proceeding, and shippers bore the burden when existing rates were challenged in a complaint proceeding. Section 204 applied to *Ex Parte No. 319* the burden of proof normally applicable in the former type of rate proceeding.

mission to remedy any unreasonableness or unreasonable discrimination it found. *Id.* Not a single word in Section 204, or in its legislative history, suggests that Congress meant to reverse, either for recyclables or any other commodity, the existing rule that courts may not enjoin or suspend railroad rates never found to be unlawful by the Commission.

There is equally no basis for suggesting that such an alteration should be inferred from the "purposes" of Section 204, since this Court has specifically rejected just such an argument in a closely parallel case. In *SCRAP I,* the recycling industry argued that, despite the *Arrow* rule, a judicial power to enjoin or suspend recyclable rates not found unlawful by the Commission should be inferred from the broad purposes of the National Environmental Policy Act. This Court emphatically rejected the argument, pointing out that neither the statute nor its legislative history indicated any intent to repeal *Arrow.*[8] The same reasoning disposes of Section 204 as a silent basis for injunctive power in this case.

3. NARI's brief, in a shower of invective, accuses the railroads of "diabolically" (NARI Br. 21, 24) multiplying rate increases on recyclables. The level of increases has nothing to do with the question presented, namely, whether the lower court exceeded its statutory powers and defied three consistent decisions of this Court by enjoining the railroads' rates. In any event, an examination of the resulting rate levels on recyclables, including all of the increases assailed by

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[8] "[N]owhere, either in the legislative history or the statutory language, is there any indication that Congress intended to restore to the federal courts the power temporarily to suspend railroad rates, a power that had clearly been taken away by . . . the Interstate Commerce Act." 412 U.S. at 694.

NARI, shows that recyclable rates are modest and in a number of categories are extraordinarily low.

On the next page there is set forth a table, showing the revenue-to-variable-cost ratios for the major categories of recyclables, derived from Schedule C submitted in *Ex Parte No. 375,* which is the last general rate increase case in which increases on recyclables have become effective.[9] Schedule C is an official railroad filing required by the Commission's rules (49 C.F.R. § 1102.4) and this very Schedule C data was relied upon by NARI itself in another Court of Appeals case. What the table shows is that:

> —*all* of the ratios are well below the 180% figure fixed by the Commission in its guidelines in *Ex Parte No. 319,* a ceiling which the Commission itself admitted was low compared to maximum ratios used for other commodities. Pet. App. 11d.
>
> —31 of the 34 ratios are below the 160% level which Congress has fixed in the Staggers Act of 1980 as one below which the Commission may not even investigate the reasonableness of rates on other commodities. 94 Stat. 1900.
>
> —A number of the most important categories, *e.g.,* iron and steel scrap, textile and paper scrap, are very low and, in some cases, do not even appear to cover the variable costs of the movements, let alone their fully allocated costs.

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[9] The schedule shows "total" (East, South and West) revenue-to-variable ratios (with current cost of capital) for intra-district and inter-district movements, including proposed revenue from *Ex Parte No. 375* on a pro forma basis. Verified statement of Marion L. Hall, February 1980, *Ex. Parte No. 375,* pp. 126-88, line 60, columns 2 and 5. The ratios omit certain special adjustments used in *Ex Parte No. 319* and therefore cannot be used accurately to compare ratios for virgin and recyclable commodities; but the figures are the best readily available source of recyclable ratios incorporating changes in recyclable rates and costs since *Ex Parte No. 319.*

RATIOS FROM SCHEDULE C SUBMITTED IN EX PARTE NO. 375

Commodities	*Intra-district*	*Inter-district*
Rubber or plastic waste or scrap	104.7	108.6
Cullet	142.1	162.3
Iron & steel scrap	118.8	120.6
Copper matte	145.6	124.1
Lead Matte	136.4	151.9
Zinc dross	121.7	137.7
Aluminum residue	152.2	148.7
Miscellaneous nonferrous metal residue	169.4	163.5
Ashes	66.6	149.2
Brass etc. scrap	131.2	130.2
Lead etc. scrap	106.4	147.1
Aluminum or alloy scrap	138.2	128.4
Tin scrap	100.1	100.4
Textile waste	94.1	74.7
Wood scrap or waste	106.6	85.9
Paper waste or scrap	102.8	89.7
Municipal garbage	99.3	153.4

This table amply refutes NARI's rhetorical assertions that rail rates on recyclables are excessive.[10] It also shows that respondent ISIS, which represents the iron and steel scrap industry is complaining about ratios which are not only modest but *below* fully allocated costs. As for respondent Fort Howard, which describes itself as a consumer of wastepaper, the intradistrict ratio is virtually at variable cost and the interdistrict ratio is below variable cost, meaning that the railroad industry and other shippers are actually subsidizing (involuntarily) companies like Fort Howard. It is ratios like these that the railroads have been attempting to remedy and it is exactly these unduly low ratios that will be further lowered by the lower court's revocation order.

4. Several of the respondents refer to the Staggers Act of 1980, the latest in a series of railroad regulatory reform statutes,[11] as if it were an endorsement of the lower court's position, or at least in some way lessened the significance of its unlawful injunction. NARI Br. 17; Fort Howard Br. 12. Nothing could be further from the truth. To the extent that the Staggers Act relates to rate suspension power and judicial review, the thrust is precisely in the opposite direction from that suggested by respondents.

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[10] Similarly inaccurate is NARI's claim that the *rate* of increases is high. For example, NARI says that recyclable increases in the period 1967 through 1977 totaled 70%. Yet between 1969 and 1979, the index of the railroads' own costs for wages and materials rose 180.7%. R.R. Comments, *Ex Parte No. 320 (Sub. No. 1)*, April 2, 1980, p. 23.

[11] These statutes include the 3R Act of 1973 (87 Stat. 985), the 4R Act of 1976, and now the Staggers Act of 1980, all prompted primarily by concern about the railroads' deteriorating financial position.

Reflecting ever greater concern about limitations on rate adjustments, Congress has in the Staggers Act further restricted the Commission's suspension power: it increased the evidentiary showing that must be made by parties seeking suspension (94 Stat. 1907), shortened the maximum suspension period (*id.*), and enlarged the annual increases that railroads may now introduce which the Commission is not entitled to suspend at all. 94 Stat. 1903. No judicial power to suspend or enjoin rates was enacted by the Staggers Act, either for recyclables or for any other category of commodities. Instead, both the statute and legislative history express approval of the *Arrow/Seaboard Allied* doctrine that refusals to suspend and investigate rates are not reviewable in court, a principle integrally related to the rule of *Arrow* and *SCRAP I* that the courts may not enjoin rates that the Commission has declined to suspend and has never found unlawful.[12]

In the sole provision dealing explicitly with recyclables, the Staggers Rail Act of 1980 leaves untouched existing ICC guidelines in *Ex Parte No. 319* as applied to iron and steel scrap, which represents about half of the recyclable traffic. 94 Stat. 1905. For nonferrous scrap, the Staggers Act directs the Commission to develop a new revenue-to-variable-cost standard as specified in the statute (*id.*), but the preliminary indication is that practically all of the existing recyclable rate ratios will meet the new standard.[13] Far from

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[12] 94 Stat. 1904; H. Rep. 96-1430, 96th Cong., 2d Sess. 95 (1980). See *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. at 670.

[13] Congress conjectured that the new figure for nonferrous scrap would probably fall somewhere around 150%. S. Rep. No. 96-470,

suggesting any new power in the courts, the provision dealing with recyclables provides that "the *Commission* shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection." 94 Stat. 1905 (emphasis added).

The Staggers Act thus has nothing whatever to do with the question whether the federal courts, either in this case or in the future, are entitled to enjoin railroad rate increases which have never been found to be unlawful by the Commission. The lower court's order, with which the railroads have sought to comply as promptly as possible, remains an unlawful order that will inflict multi-million dollar harm on the railroads for the indefinite future.[14] Unless and until this Court makes clear that *Arrow, SCRAP I* and *Aberdeen* mean exactly what they say, judicial injunctions against railroad rates will continue. If three decisions

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96th Cong., 1st Sess. 34 (1979). In fact, at current cost of capital rates, it is likely to be higher. Even at 150%, 28 out of the 34 ratios set forth in Schedule C (see p. 8, above), would meet the test, and *all* of the most important ones would do so.

[14] ISIS suggests that a $5 million annual loss is not very important (ISIS Br. 6) but this is untrue. The rate reductions ordered by the lower court are reductions in net income (ISIS' comparison with gross revenues is a distortion); and they fall with special severity on Conrail whose financial position is well known. See R.R. Pet. 10. Moreover, the $5 million figure only measures the annual impact with respect to rate increases already in force which have to be revoked; unless the lower court modifies or reinterprets the order, it will shortly begin to require deferral of *other* rate increases, including both those that are scheduled to become effective and those that would otherwise be filed, and the dollar impact will multiply accordingly. The lower court order contains no time limitation, and there is no indication that the remand proceeding to which it is linked will be completed at any time in the near future.

of this Court do not constitute a basis for summary reversal—or at least review—of a directly inconsistent lower court decision, it is difficult to imagine what would.

CONCLUSION

For the reasons stated above and in the railroads' petition, certiorari should be granted and the order below should be summarily reversed on the authority of *Arrow, SCRAP I,* and *Aberdeen.* In the alternative, certiorari should be granted, and the case should be set for briefing and oral argument on an expedited schedule.

Respectfully submitted,

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